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Senate

Statement of Senator Dianne Feinstein

"In Opposition to the Federal Marriage Amendment"

Mrs. FEINSTEIN. Mr. President, I wish to make an argument directly contrary to the arguments just presented by the distinguished Senator from Pennsylvania. I do not consider myself an expert on marriage. I have been married for a long time. I have one daughter, three stepdaughters, and five grandchildren. I celebrate marriage. I understand the difficulties in working to keep it together. But I believe this is a waste of time.

The votes are not present to submit this amendment to the States. The timing is just a few months before an election, and family law has always been relegated to the States. This essentially would be the first departure from that.

My argument today is based on my understanding of the law. My understanding of what is happening in the States indicates to me that the States are well able to handle the issue of marriage on their own. The tenth amendment of the U.S. Constitution clearly states:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Marriage is not once mentioned in the Constitution. Most authorities believe it to be a power reserved to the States.

As early as 1890, that is 114 years ago, in *In Re Burrus*, the United States Supreme Court, in a child custody dispute, stated:

"The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."

Later, in a 1979 Supreme Court decision, *Hisquierdo v. Hisquierdo*, the Court stated in dicta:

"Insofar as marriage is within temporal control, the States lay on the guiding hand."

Furthermore, the courts have long held that no State can be forced to recognize a marriage that offends a deeply held public policy of that State. States, as a result, have frequently and constitutionally refused to

recognize marriages from other States that differ from their public policy. Polygamous marriages, for example, even if sanctioned by another State, have consistently been rejected. Marriages between immediate family members have also been rejected by States, even if those marriages are accepted in other parts of the country. In no case that I know of has the full faith and credit clause of the U.S. Constitution been used to require a State to recognize a type of marriage that would violate its own strong public policy. So States have been on their own with respect to family law, including marriage.

Even as we consider the Federal Marriage Amendment, we see that the States are taking their right and powers as they relate to family law and marriage very seriously. Thirty-three States have passed their own Defense of Marriage Acts, banning same-sex marriages, and five have passed ballot initiatives banning same-sex marriages.

My own State, California, passed a Defense of Marriage Act in the year 2000. Proposition 22 was ratified by an overwhelming majority of Californians, 61 percent. The California Family Code now states that: Only marriage between a man and a woman is valid or recognized in California.

That is the law of my State. That policy statement trumps all local and other law.

Earlier this year, the mayor of my city, Gavin Newsom, of San Francisco, decided this law was unconstitutional and ordered the county clerk to issue marriage licenses to same-sex couples. These actions did not go unnoticed, and the California State Supreme Court subsequently enjoined the county clerk from issuing any further marriage licenses, and the county complied. Oral arguments were heard on the cases on May 25, and the State Supreme Court will issue its decision within 90 days.

However, I want to make clear, crystal clear, that the Court is not deciding on the constitutionality of Proposition 22, which said that marriage shall be between a man and a woman. Rather, the Court issued orders to show cause in *Lewis v. Alfaro* and *Lockyer v. City and County of San Francisco,* limited to the following issue: Were the officials of the City and County of San Francisco exceeding or acting outside the scope of their authority in refusing to enforce the provisions of Family Code sections 300, 301, 308.5, and 355 in the absence of a judicial determination that those statutory provisions are unconstitutional? In other words, acting in defiance of the statewide referendum?

The orders to show cause are specifically limited to this legal question, and they do not include the substantive constitutional challenge to the California marriage statutes themselves. The marriage statute, therefore, is not in jeopardy of being overturned.

When we look around, we see that California is not the only State where people are speaking out about same-sex marriage. In fact, a lively debate is taking place throughout the country.

On July 6, the Washington Times ran an article entitled, "Marriage Gets a Boost in Michigan." The article notes that the supporters of traditional marriage in Michigan recently turned in approximately 475,000 signatures to put a State constitutional amendment before the voters this November. An organizer of the effort was quoted to say:

"The people responded. They're tired of politicians and activist judges making changes without having a voice. This gives them a voice."

The article goes on to say:

"Michigan's achievement marks a four-for-four victory for those who want marriage amendments on the November ballot. Montana, Oregon and Arkansas will place similar measures on their ballots this November."

Mr. President, your own State will have one on the ballot. North Dakota and Ohio are collecting signatures necessary for ballot measures.

As you can see, the States have taken up the just powers accorded to them by the Constitution of the United States and are responding to this issue, and that is as it should be.

The Family Research Council reported in a press release on July 9: [A]n unprecedented nine States already have State constitutional amendments on the ballot this fall and that number is expected to increase to at least 14 States. Thirty-eight States have previously gone on record stating marriage is between one man and one woman. The people are making their voices heard in their States but unfortunately that is not enough.

Yet in the words of the Family Research Council, these actions by States are "unprecedented" and show that a process is, indeed, taking place throughout the country and that the people are active participants. Through that process, the people do have a voice and they are being heard. I believe interference from Washington in this political process is premature, unnecessary, and not in the context of the Constitution of the United States.

In light of this, it appears that proponents of the Federal Marriage Amendment disregard the debate occurring in the States and point only to Massachusetts and the fact that marriage licenses are being issued legally to same-sex couples there. They argue that the same-sex marriages in Massachusetts, the first State to allow such marriages, are what is driving the need to enshrine in the Constitution language that marriage is between a man and a woman. I disagree.

Even in Massachusetts, the State legislature has begun work on a State constitutional amendment to bar same-sex marriages but allow civil unions. This amendment is certainly not guaranteed to pass, but it is clear that the people of Massachusetts are dealing themselves with the issue as was intended and, again, it would seem without the need of assistance from Washington.

Because several dozen States have already passed a prohibition on same-sex marriage, it seems clear that in those States an argument could be made that strong public policy would lead to a refusal to recognize out-of-State same-sex marriages.

So it is not a problem demanding an immediate solution. There is a process taking place in the States throughout the country as was envisioned by the Constitution. For us to act now is not only premature but it isn't going to work because the votes are not here.

So why are we doing this? Why are we doing this when we have only passed one appropriations bill? Why are we doing this when last week we just had a briefing on the impact of terrorism on this Nation and we haven't passed a Homeland Security bill? Why are we doing this when the Constitution has reserved family law to the States and when States by the dozens have already taken up the issue and passed, either by legislature or by vote of the people, marriage amendments? Why are we doing this? The only answer I can come up with is because this is political. It is to drive a division into the voters of America, into the people of America, one more wedge issue at a very difficult time to be used politically in elections. Everybody in this body knows they are nowhere close to 67 votes. If there were a motion to proceed, there might not even be enough votes for a motion to proceed.

Why are we doing this? Why are we stirring up the Nation? I probably have 53,000 pieces of mail on this subject alone. People do not understand that the Constitution relegates family law to the States, and has relegated the issue of adoption, marriages, and everything having to do with family law to the States.

My daughter happens to be the supervising judge of the family court in San Francisco. You can talk to any judge and see just that. The States have responded. It is not as if the States have ignored those issues. More than 36 States -- more than three dozen States -- have passed legislation, and 8 are moving shortly.

For the life of me, I don't understand what honest motive there is in putting this in front of this body to philosophically debate marriage on a constitutional amendment that is not going to happen, and which is enormously divisive in all of our communities.

I hope my colleagues will exercise prudence and tread carefully with our

Constitution. I don't think we want to put out an amendment -- I don't think we can, but let us say with some change and there were 67 votes, as the Senator from Pennsylvania correctly said, it then has to go to a vote of three-quarters of the State legislatures. When three-quarters of the States have already taken action, why would they ratify this? I think it is a useless exercise.

I have been on the Judiciary Committee long enough now to be able to take an issue and see if it is properly before us. I don't believe a constitutional amendment reserving the right of marriage to a man and a woman is properly before us because I believe that is an area clearly relegated to the States, and the States are exercising that right.

Thank you very much. I yield the floor.